Supreme Court, U.S.
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No. 99-866

IN THE

Supreme Court of the United States

ORSON INC.,

Petitioner,

v.

MIRAMAX FILM CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF THEATER OWNERS OF PENNSYLVANIA IN SUPPORT OF PETITIONER

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INTERESTS OF THE *AMICUS*

Amicus Curiae, the National Association of Theatre Owners of Pennsylvania ("NATO of PA"), is a Pennsylvania not-for-profit corporation.[1] It serves as the Pennsylvania trade association for motion picture exhibitors, whose members are the owners and operators of many of the motion picture theatres which exhibit feature motion pictures at locations throughout the Commonwealth of Pennsylvania. Some are "first run" theatres, some are "second run" or "subsequent run" theatres. Some exhibit commercial motion pictures, others exhibit so-called art pictures. All exhibitors, together with the movie-going public, are the beneficiaries of the provisions of the Pennsylvania Feature Motion Picture Fair Business Practices Law, 73 P.S. § 203-1 *et seq.* (the "Law").

In the 20 years since the Law was enacted, the foresight of the Pennsylvania General Assembly in passing the Law has been borne out by the tremendous growth in the number and size of motion picture exhibitors in Pennsylvania. Some of this growth — particularly the growth in Pennsylvania of national exhibitors such as American Multi-Cinema, Inc., United Artist Theatre Circuit and Regal Cinemas, however, is not unique to Pennsylvania and reflects national trends. What has been unique, however, has been both the resiliency and growth of smaller circuits and all independent theatres, as well as the continued viability of one and two screen theatres in Pennsylvania, all contrary to the national trend. Much of this growth and viability can be attributed to the provisions of the Law and in particular to the provisions of

1. No counsel for a party authored any part of this *amicus curiae* brief, and no person or entity other than the *amicus curiae* made a monetary contribution to the preparation or submission of this brief. (Rule 37.6 of the Supreme Court of the United States).

Section 203-7 of the Law, the so-called "42 day rule." For small theatres the 42 day rule has been a life preserver which not only has helped small businesses survive but has enabled small exhibitors to grow. As the record in this case apparently demonstrates, absent some version of the 42 day rule, independent exhibitors will find it almost impossible to obtain quality feature motion pictures in a reasonable time period, and in many instances will not be able to remain in business.

NATO of PA submits this *amicus curiae* Brief because it believes that the opinion *en banc* of the United States Court of Appeals for the Third Circuit erred as a matter of law in the manner in which the Court chose to construe the 42 day rule. A construction of the 42 day rule is fairly possible by which a constitutional question of preemption may be avoided. This Court should grant certiorari for this reason alone, to reverse the unnecessary and incorrect construction placed on the 42 day rule by the Third Circuit.

Moreover, NATO of PA believes certiorari should be granted to allow for this Court to consider and address what rights are included within the grant of copyright, and particularly whether the Court of Appeals *en banc* erred in concluding that the 42 day rule prohibits the copyright holder from exercising rights protected by the Copyright Act.

Finally, this case presents an excellent opportunity for this Court to both explore and define the scope and limits of federal preemption and the copyright laws. The scope of federal preemption of state laws is already before this Court in three other cases this term; this case presents an excellent opportunity to deal with the question in the context of copyright.

All parties have consented to the filing of this *amicus* brief as reflected in a Stipulation of Consent separately submitted to this Court. Pursuant to the Court's rules, the *amicus* brief brings relevant matter to the attention of the Court, from the perspective of NATO of PA, which was not already brought to the Court's attention by the Petitioner. (Rule 37.1 of the Supreme Court of the United States). Every effort has been made to avoid or minimize duplication with Petitioner's brief.

SUMMARY OF ARGUMENT

This Court has consistently held when a statute is reasonably susceptible of two constructions, by one of which it is unconstitutional and the other valid, the court should adopt the interpretation which will uphold the statute. The Court of Appeals *en banc* has acknowledged that the 42 day rule is susceptible of two constructions. The plain language of the statute, that a license for more than 42 days merely needs to make *provision* to expand the run, does not mandate any activity with respect to distribution of the copyrighted motion picture and can be interpreted in a manner by which the constitutionality is saved. The *en banc* Court of Appeals for the Third Circuit erred by construing the statute in a manner which leads to its unconstitutionality.

While any contractual sale or license of a motion picture is copyright based, the purpose of the copyright law is not to establish elements of the bargain between distributor and exhibitor. Contracts do not create exclusive rights, but merely allocate rights between the parties. Just as the distributor and exhibitor are free to negotiate and bargain as to contractual terms, the state legislature is free to address practices in the bargaining which the legislature believes to

be inequitable and against public policy, all without impacting on copyright.

This Court has already heard argument in three cases this term dealing with whether a court should consider implied or conflict preemption where Congress has already expressed its intent in the form of express statutory preemption. This case presents an excellent opportunity to consider the same question under the Copyright Act.

ARGUMENT

The Court of Appeals *En Banc* Erred by Failing to Construe the 42 Day Rule in a Manner Which Does Not Lead to its Unconstitutionality.

The determination of the constitutionality of the 42 day rule under the Law has had a long and tortuous history before the federal courts.

In *Associated Film Distribution Corp. v. Thornburgh*, 683 F.2d 808 (3rd Cir. 1982) ("*AFD I*"), reversing 520 F. Supp. 971 (E.D. Pa. 1981), the United States Court of Appeals for the Third Circuit reversed a grant of summary judgment by the district court, which summary judgment had held, *inter alia*, that the 42 day rule was preempted by the Copyright Act. In *AFD I* the Court of Appeals rejected an argument that the 42 day rule was facially preempted.

In *Associated Film Distribution Corp. v. Thornburgh*, 800 F.2d 369 (3rd Cir. 1986) ("*AFD II*"), *cert. denied*, 480 U.S. 933 (1987), *affirming*, 614 F. Supp. 1100 (E.D. Pa. 1985), the Court of Appeals, after trial before the district court, once again affirmed the constitutionality of 42 day

rule against a preemption challenge. The Court held that the decision in *AFD I* conclusively established that the 42 day law was not preempted by the Copyright Act. 800 F.2d at 375.

In *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358 (3rd Cir. 1996) ("*Orson I*"), the Court of Appeals rejected the copyright challenge to the 42 day rule on the basis of *AFD I* and *AFD II* since the Pennsylvania law "on its face contains no threat to the copyrights themselves . . ." 79 F.3d at 1373 n.14.

From 1986 when the Court of Appeals issued its opinion in *AFD II* and upheld the constitutionality of the 42 day rule through, and including the panel decision of the Court of Appeals in *Orson I,* the constitutionality of the 42 day rule was a closed question. Not until the subsequently vacated panel decision of the Court of Appeals in this case (found at 174 F.3d 377 (3rd Cir. 1999)), which opinion chose to ignore both the law of the case doctrine and the Third Circuit's own Internal Operating Procedure 9.1, did the question of the constitutionality of the 42 day rule once again surface.[2] Apparently based on the irregularity, the Third Circuit Court of Appeals correctly chose to vacate the panel decision and review the case *en banc.* Upon *en banc* review, it issued substantially the same opinion as the prior vacated panel decision and held 73 P.S. § 203.7 to be unconstitutional.

As *amicus curiae*, NATO of PA vehemently disagrees with the manner in which the Court of Appeals *en banc*

2. NATO of PA did not participate as a party or an *amicus curiae* in the *Orson* case prior to the panel decision, as exhibitors had no reason to suspect the constitutionality of the 42 day rule was an open issue.

construed the language of the 42 day rule. 73 P.S. § 203-7 provides:

> No license agreement shall be entered into between distributor and exhibitor to grant an exclusive first run or an exclusive multiple first run for more than 42 days without provision to expand the run to second run or subsequent run theatres within the geographical area and license agreements and prints of said feature motion picture shall be made available by the distributor to those subsequent run theatres that would normally be served on subsequent run availability.

Before any decision as to whether the 42 day rule is preempted, the Court must "first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided." *City of Monterey v. Del Monte Dunes at Monterey Ltd.*, 119 S. Ct. 1624, 1637 (1999); *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 345 (1998). When a statute is reasonably susceptible of two constructions, by one of which it is unconstitutional and by the other valid, the Court should adopt the interpretation which would uphold the statute. "[E]very reasonable construction must be resorted to in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)).

It is remarkable, that in the opinion *en banc*, the Third Circuit apparently chose not to apply this venerable rule of statutory construction. Rather than analyze the statutory language of the 42 day rule itself, the Court of Appeals

en banc instead jumped to the conclusion that it could see "no reason why the Pennsylvania legislature would have permitted consecutive forty two (42) day licenses to the same exhibitor." 189 F.3d at 381. In *AFD II*, the same court had previously concluded that the plain language requires a distributor to make provision "to *expand* the run to second run or subsequent run theatres within the geographical area" and to make available prints of its feature films "to . . . subsequent run theatres. . . ." 860 F.2d 369 at 377 (3rd Cir. 1986).

The court *en banc* here readily acknowledged that the statutory language is " 'sufficiently vague' to permit alternate readings" (citing *Orson, Inc. v. Miramax Film Corp.*, 862 F. Supp. 1378 at 1387 (E.D. Pa. 1994)); and that it was inartfully drafted, such that both various distributors and exhibitors interpret its requirements differently (citing *Associated Film Distribution Corp. v. Thornburgh*, 614 F. Supp. 1100 at 1111 (E.D. Pa. 1985)). *See* 189 F.3d at 380. Given such concession, it is both contrary to the rule which requires that a statute be interpreted in a manner by which the constitutionality of the statute is saved and logically inconsistent for the court *en banc* to conclude that the exclusive first run must be expanded after 42 days.

Following the original constitutional trial in *Associated Film Distribution Corp. v. Thornburgh*, the district court, which had heard the evidence and understood how motion pictures are in fact licensed, rejected the construction of the 42 day rule that no theatre may play a film for longer than 42 days. 614 F. Supp. 1100 at 1111. The district court logically reasoned that there is no support for such an interpretation in Section 203.7. The express statutory

language does not prevent distributors from contracting for runs for longer than six (6) weeks. It merely says that if such a contract is made, it must contain some *provision* for expanding the run within the geographical area after the 42nd day. Read literally, the statute does not prevent a distributor from entering into a series of exclusive licenses with one exhibitor as long as each license does not exceed 42 days. 614 F. Supp. at 1123-1124.

The Third Circuit Court of Appeals *en banc* has improperly placed emphasis on the word expand. The statute literally provides that "no license shall be entered into . . . for more than 42 days without *provision* to expand the run . . ." (emphasis applied). The plain language places the emphasis on merely making *provision*, allowing for possible expansion, rather than mandatory expansion.

The plain language of the 42 day rule does not prevent distributors from contracting for runs of longer than six (6) weeks. All that the statute says is that if a contract for more than 42 days is entered into, than the license must provide the opportunity for the distributor to expand the run within the geographical area to second or subsequent run theatres. If the license is for less than 42 days, there is no requirement whatsoever that the run must be expanded. Even if the license is for more than 42 days, there is no requirement in the statute that a distributor, acting in good faith and exercising its reasonable business judgment and faced with multiple requests to license the motion picture, is required to accept an offer to license the motion picture by any particular second run or subsequent run theatre. Finally, there is nothing in the 42 day rule which should have led the court *en banc* to conclude that there is no language in the 42 day rule which prevents a distributor from entering into series of exclusive

licenses with one exhibitor as long as each license does not exceed 42 days.

As this Court has said many times, acts of the legislature — whether Congress or the Pennsylvania General Assembly — are presumed to be constitutional. *Jones v. United States*, 119 S. Ct. 1215, 1222 (1999); *Edward J. DeBartolo Corp. v. Florida Coast Gulf Bldg. and Constr. Trades Council, supra*, 485 U.S. at 575 (1988). Section 203-7 of the Law is readily susceptible to construction by which the constitutional question of preemption need not be reached.

The Court of Appeals *En Banc* Erred As the Rights Granted in a Copyright Do Not Limit the Ability of the Distributor and Exhibitor to Contract or the Ability of the State to Address Inequities in Such Contractual Bargaining.

Preemption is strong medicine. Its exercise is not lightly to be presumed. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). The conclusion reached by the Third Circuit Court of Appeals *en banc*, that the "42 day rule is copyright based in essence" and thus must be pre-empted under conflict preemption, misapplies both the purposes of the Copyright Act and what the 42 day rule seeks to accomplish. This Court should grant the Petition for Writ of Certiorari in order to delve more deeply into both the purpose of the grant of copyright and what the 42 day rule actually seeks to accomplish. Such examination would lead this Court to reverse the opinion of the Court of Appeals.

The 42 day rule is not directed at any of the rights granted under 17 U.S.C. § 106. More specifically, 73 P.S. § 203-7

does not seek to prohibit distribution of motion pictures in Pennsylvania. To the contrary, the provisions of the 42 day rule are directed at certain contractual provisions contained in the motion picture distributors' nonnegotiable license agreements which deal with length of run and exclusivity.[3] Such contractual provisions are not controlled by the Copyright Act.

Copyright law represents a balance devised by Congress to advance the public interest which on the one hand provides incentive to authors to create, and on the other hand attempts to safeguard the free flow of information on which the creativity is based. *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991); *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975).

NATO of PA recognizes that preemption questions under copyright law can and do arise with regard to nearly any state law that might tangentially apply to informational works. The laws of contract and unfair competition are no different. Preemption issues arguably arise whenever an authors' or users' copyright rights appear to be either enlarged or reduced by contract.

The fallacy of the reasoning of the court *en banc* is its failure to recognize that any contractual sale or license of a

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3. The legislative findings and purposes for the Pennsylvania Law are set forth in 73 P.S. § 203-2. The legislative findings and purposes for the 42 day rule are to enable feature motion pictures to be exhibited at many different locations without delay, thereby promoting wide geographical dissemination at reasonable prices to the public of ideas, opinions and artistic expression in feature motion pictures. 73 P.S. § 203-2 (1, 4, 5, 9).

motion picture is copyright based in essence. If the court *en banc* is correct, the transferee or licensee of a motion picture or any copyright work can never sue the copyright holder for breach of contract because of the protections and rights granted to the copyright holder under the Copyright Act. Any such suit for breach of contract would be preempted. Obviously there are no cases which suggest such an absurd result. A simple transfer of rights is unlikely to be challenged on preemption grounds because such transfer is the revenue generating means of the distributor's creative efforts. I. Trotter Hardy, *Contracts, Copyright and Preemption in a Digital World*, 1 Rich.J.L.& Tech. 2 (1995), http:\\www.richmond.edu.jolt\vlil\ hardy.html.

The Copyright Act establishes the right of the copyright holder in intangibles. The Copyright Act was not intended to serve as a means of defining specific rights and duties with regard to the use of intangibles.[4] The Copyright Act is to provide a backdrop for negotiations and bargains, not to predetermine itself liabilities. In other words, it does not follow from the Copyright Act that any attempt to limit the rights of the copyright holder by contract is pre-empted.

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4. I. Trotter Hardy *Contracts, Copyright and Preemption in a Digital World, supra.* In 1995, Hardy freely admitted at footnote 33 that he could find not specific authority for this view. Yet since his article, this dichotomy and the substantially different results to which it leads has been recognized by other academic discussions as well as in cases. *See, e.g.*, Niva Elkin — Koren, *Copyright Policy and Limits of Freedom of Contract*, 12 Berkeley Technology Law Journal, http:\\www.law.berkeley.edu\journals\btlj\articles\ 12-1\koren.html; Maureen A. O'Rourke, *Copyright Preemption After the PROCD Case: A Market Based Approach*, 12 Berkeley Technology Law Journal, http:\\www.law.berkeley.edu\journals\btlj\articles\ 12-1\orourke.html.

Contract law, not copyright law, governs bargaining, the transferability of rights held by the copyright holder. Contract law cannot alter or change the initial grant of the copyright. An exhibitor has no right to change the content of the motion picture, to copy the motion picture, to exhibit without license or purchase, or to prevent any distribution by the distributor.

Nevertheless, the distributor and the exhibitor are free to establish contractual terms for sale or license as with any other bargain. *PROCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996). In *PROCD, Inc. v. Zeindenberg*, *supra*, the Seventh Circuit specifically held that contract rights cannot be the equivalent to rights under copyright, because contracts do not "restrict the options of person who are strangers to the author." 86 F.3d at 1454. The Seventh Circuit concluded that the contracts must be enforceable under 17 U.S.C. § 301 because contracts do not create "exclusive" rights but only allocate rights between the parties: "whether a particular license is generous or restrictive, a simple two-party contract is not equivalent to any of the exclusive rights within the general scope of the copyright." 86 F.3d at 1455.[5]

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5. Other Circuits have been unwilling to go quite as far as the Seventh Circuit, and require that in order for preemption not to occur, the state law violation must be predicated upon an act "incorporating elements beyond mere reproduction and the like . . . ," the so called "extra element." *Harper & Row Publishers v. Nation Enterprises*, 723 F.2d 195, 200 (2d Cir. 1983), *rev'd on other grounds*, 471 U.S. 539 (1985); *Acorn Structures, Inc. v. Swantz*, 846 F.2d 923, 926 (4th Cir. 1993). Restrictions against unfair competition meet this extra element.

All cases dealing with contract have limited their analysis to Section 301 of the Copyright Act and have not addressed conflict preemption.

Just as the distributor and exhibitor are free to negotiate and bargain as to the terms and provisions of the contract or license, the state legislature is free to address practices in the bargaining which it believes are inequitable and against public policy, all without impacting on the copyright. The efforts by the Pennsylvania Legislature to address the inherent unfairness and negative public policy of the long term exclusive license is really no different than any of the other practices addressed by the Law which the Third Circuit upheld in *AFD I* and in *AFD II*. Copyright interests are not affected or are at best tangentially impacted when states govern the terms of commercial bargains or transactions, including the terms of contracts. *See also Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408 (S.D. Ohio 1980), *affirmed in part, reversed in part*, 679 F.2d 656 (6th Cir. 1982); *Warner Bros. v. Wilkinson*, 533 F. Supp. 105 (D. Utah 1981), *appeal dismissed*, 782 F.2d 136 (10th Cir. 1985).

This case presents a significant opportunity for this Court to address the true nature of copyright, the ability of parties to contractually bargain, and the ability of the state legislature to deal with what it perceives to be unfair and inequitable provisions which are against the state's public policy. For these reasons, NATO of Pennsylvania respectfully requests this Court to grant the Petition for Writ of Certiorari.

This Case Presents an Excellent Opportunity For This Court To Rethink Preemption Law in the Copyright Field Generally

In its Petition for Writ of Certiorari, petitioner has argued that, under *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992), express preemption, rather than implied or conflict preemption, should control when Congress has made

clear that it intends to expressly preempt an area. The Court should not be free to also consider conflict preemption in such situations, *i.e.*, "There is no need to infer Congressional intent to preempt state laws from the substantive provisions" of the legislation. NATO of Pennsylvania does not intend to repeat that argument herein.

However, this Court has already heard argument in three cases this term which deal with this precise issue, *Geier v. American Honda Motor Co.*, No. 98-1811, *United States v. Locke*, No. 98-1701 and *International Association of Independent Tanker Owners v. Locke*, No. 98-1706. This case presents an excellent opportunity for the Court to consider the same rationale within the sphere of copyright. This Court has always treated copyright as similar to, but not exactly the same as other preemption. Particularly since the enactment of the 1976 Copyright Law, this Court has begun to look more closely at express copyright preemption, as opposed to implied or conflict preemption issues. This case presents an excellent opportunity, as suggested by Petitioner to the Court, to review whether the law is preempted solely by express preemption under 17 U.S.C. § 301, and reject any review under implied or inferred conflict preemption.

CONCLUSION

For the reasons set forth herein, *Amicus Curiae* NATO of PA respectfully requests that the Petition of Orson, Inc. for Writ of Certiorari be granted.

Respectfully submitted,

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